

1 A My view is I always want to get
2 primary source documents. I would always like
3 to get documents from another source to the
4 extent that it's possible. And it's probably
5 the theory of third best.

6 Q Okay. Do you have my question?
7 My question was, would it be fair for me to
8 criticize your conclusions simply because you
9 cited those newspaper articles?

10 A I'm not going to decide whether
11 you can criticize me or not. I think you can
12 make that --

13 Q Do you think that would be fair?

14 A I think it is what it is. It's --
15 - the question is, is it factually correct.

16 Q Let me turn to something --

17 JUDGE SIPPEL: Let me ask it a
18 different way. Do you think that reduces the
19 value of your conclusions?

20 THE WITNESS: I think one has to
21 put it in context. But I think, look, if
22 there's better evidence that could be cited

1 and it's contradictory to the facts, then I
2 would do it.

3 JUDGE SIPPEL: Forget about that.
4 Just the bare fact alone that you're relying
5 on the type of evidence that Mr. Schmidt
6 refers to, does that reduce the value of your
7 economic conclusions?

8 THE WITNESS: I don't think it
9 reduces the overall value, because I think the
10 way that it's being cited is relatively minor
11 relative to the bigger points where those are
12 primary source or data -- so, I think the
13 answer is it doesn't have a significant effect
14 that I've cited it.

15 JUDGE SIPPEL: Is there any
16 dispute to the facts that you're citing them
17 for? Is there any dispute?

18 THE WITNESS: I don't think there
19 is any dispute with regard to the facts that
20 I'm citing them for, but maybe, perhaps, there
21 are. I don't believe there are.

22 JUDGE SIPPEL: It's never been

1 brought to your attention.

2 THE WITNESS: Not to my attention.

3 JUDGE SIPPEL: Were you deposed by
4 counsel in this case?

5 THE WITNESS: For a long time.

6 JUDGE SIPPEL: Was anything said
7 at that, or was anything done to question the
8 validity of those sources at that time?

9 THE WITNESS: I never was
10 questioned on a newspaper article that I'm
11 aware of, that I recall, in my deposition
12 despite that it went on for pages and pages.

13 JUDGE SIPPEL: All right. I'll
14 take your word. I'm not going to check it.

15 (Laughter.)

16 MR. TOSCANO: It's like 500 pages
17 long. You sure you don't want to read it?

18 MR. SCHMIDT: It's good for your
19 health, Your Honor.

20 BY MR. SCHMIDT:

21 Q Let me ask you a weightier
22 question. Do you agree with me that it's

1 important for you to avoid bias in your
2 results?

3 A Of course.

4 Q You wouldn't ask the Judge to rely
5 on your results if they were biased?

6 A No, not at all.

7 Q And you agree with me that it's
8 important to involve cherry-picking in your
9 data sets where you consider some of the data,
10 and not all of the data?

11 A I try to look at all the data, for
12 example, with the MVPDs, and then explain
13 potential issues with any particular one for
14 the reason that I'm -- for the reasons
15 explained.

16 Q And would you agree with me that
17 that's especially important because of the
18 amount of work you've done for Comcast in the
19 past?

20 A I've done work for and against
21 Comcast.

22 Q How long have you been doing work

1 for Comcast for, sir?

2 A I think the first time I worked
3 for them was 2001, and I think the first time
4 I worked against them was in 2001.

5 Q Okay. When did you last appear
6 against Comcast?

7 A I just submitted a regulatory
8 filing that I don't think is in their
9 interest. They're on the other side of the
10 matter.

11 Q Were you actually adverse to them
12 in that matter?

13 A I mean, I'm against their
14 interest, so they -- they are interested in
15 getting access to broadband funds from the
16 FCC, and I believe the satellite companies
17 should be able to bid for that. This is
18 satellite broadband companies, and that's
19 against their interest.

20 Q My question is directly against
21 their interest, where they're a party against
22 you.

1 A I would probably guess five years
2 ago, where it was directly, where they were
3 clearly 100 percent on the opposite side
4 instead of their interest.

5 Q And there have been a number of
6 instances where you've appeared before them,
7 including in program carriage cases. Correct?

8 A True, and I've turned down cases
9 that involve them, too, where I'm working for
10 them. I've turned down matters where I don't
11 agree with them.

12 Q How many times has that happened?

13 A I can think of twice in the past
14 two years.

15 Q Has that ever involved allegations
16 of program carriage access discrimination?

17 A That has not involved issues of
18 discrimination.

19 Q Has it involved allegations of
20 anti-competitive conduct?

21 A I would not say it involves issues
22 involving anti-competitive conduct.

1 Q Okay. You've testified repeatedly
2 for Comcast on those issues, though. Correct?

3 A I don't know if I'd say
4 repeatedly. I think this may be the third or
5 fourth time I've testified.

6 Q You've also done reports where you
7 haven't testified. Correct?

8 A I've done analyses in the context
9 of mergers for them, and then I've been hired
10 by broader associations, like the NCTA which
11 includes all the cable companies, and the
12 satellite companies on matters where their
13 interests are aligned, and I've also worked
14 against those companies on certain issues
15 where I disagree with them.

16 Q Let's talk about your opinions in
17 this case. You gave your opinions initially
18 in a declaration when this process was
19 initiated, and then in fuller form in a report
20 you filed February 25th, 2011. Is that
21 correct?

22 A Those dates sound about right. I

1 can't guarantee those are precisely right.

2 Q I'll vouch for the second date.

3 A Okay.

4 Q Do you recall giving a report
5 around then?

6 A That's about right, because I got
7 deposed a few weeks later by your colleague.

8 Q And you've conducted the review
9 you needed to give opinions under oath in that
10 report. Correct?

11 A Yes, I have.

12 Q And you stand behind that report
13 today. Right?

14 A Yes, I do.

15 Q Now, in reaching your opinions,
16 you were not sure whether you reviewed Comcast
17 carriage agreement with Versus, were you?

18 A At the time of my deposition, I
19 recall saying that I wasn't -- I couldn't
20 recall the details of it, but I was pretty
21 sure I had access to it, and had reviewed it.

22 Q You weren't sure whether you

1 reviewed it, were you?

2 A I said what I said. I wasn't sure
3 if I had reviewed it. I forgot what I had
4 seen, and when I had seen it, because it had
5 been a long time from when I was first hired
6 to that point.

7 Q In fact, you weren't sure there
8 even was one, were you?

9 A I couldn't -- as I said, I
10 couldn't recall the documents at my
11 deposition.

12 Q You were not sure at your
13 deposition whether Comcast even had a carriage
14 agreement with Versus. Correct? Yes or no,
15 please.

16 A At my deposition, I couldn't -- I
17 hadn't gone back before the deposition and
18 reviewed the carriage agreements, so I
19 couldn't remember the documents, or whether
20 they existed.

21 Q And you're not 100 percent sure
22 you've seen the Golf agreement with Comcast.

1 Correct?

2 A Yes, although I have,
3 subsequently, after the deposition reviewed
4 it again.

5 Q You never did a side-by-side
6 comparison of the terms in the respective
7 contracts, did you?

8 A I had reviewed the economic terms,
9 I had not sort of gone back and looked at the
10 legal terms side-by-side before my deposition.

11 Q And you didn't consider as a
12 relevant fact what level of distribution
13 Comcast was permitted, or required to carry
14 Golf and Versus on. Correct?

15 A I had considered the economic
16 terms. I had known the economic terms, but at
17 my deposition I could not recall the precise
18 legal language with regard to those
19 agreements.

20 Q Let me try to be more precise,
21 because there's a lot you have in your report.
22 You refer to it being, or in your direct

1 testimony you refer to it being 60 or so
2 pages. Correct?

3 A That is correct.

4 Q Okay. And I'd like to get through
5 that as quickly as I can, so I'm going to ask
6 you questions. And if you can, try to answer
7 them yes or no. And if you can't, please let
8 me know, and I can move on, or I can try to
9 rephrase. Is that fair?

10 A That is completely fair.

11 Q Okay. So, let me go back to my
12 question, which is, at the time of your
13 deposition you had not relied on what level of
14 distribution Comcast was permitted or required
15 to carry networks on. Yes or no?

16 A I don't believe that is a correct
17 statement.

18 Q Okay. Let's take a look at your
19 deposition.

20 A I believe my statement was I
21 couldn't recall the actual levels.

22 Q And you didn't consider that

1 central to your opinions, did you?

2 A I think I said that was secondary
3 or tertiary, because I was looking at actual
4 data, not the contractual language. As an
5 analyst, I want to see what they actually do,
6 not what the letter of the legal agreement is.

7 Q The contractual requirements were
8 tertiary to you. Correct?

9 A I believe that I used secondary or
10 tertiary in terms of whether they were
11 carrying it above that level.

12 Q You don't know whether or not
13 Comcast required the channels it owned to pay
14 launch support. Correct?

15 A Sitting at my deposition, I
16 couldn't recall the specifics of that. But,
17 subsequently, I've reviewed it, and they had
18 significant launch support for the Golf
19 Channel.

20 Q Well, you didn't think that was
21 relevant to your analysis, did you?

22 A Well, again, I go back to what my

1 analysis was, was that I was looking at actual
2 carriage today. And that was -- obviously, the
3 carriage level they got today was, in part,
4 due to history, so it was a factor, but it was
5 a secondary or tertiary factor.

6 Q So, Mr. Orszag, let me see if you
7 can answer my question yes or no. Do you
8 agree with me that it wasn't relevant to your
9 analysis, the level of launch support paid by
10 the Golf Channel or Versus to Comcast?

11 A I consider --

12 Q Yes or no, sir?

13 A It was a secondary or tertiary
14 factor.

15 Q Can you answer my question yes or
16 no?

17 A I believe I said it's a factor. I
18 don't think it is the key factor. I care
19 about actual carriage today.

20 Q You do recall being deposed.
21 You've referred to your deposition several
22 times in this case. Correct?

1 A Yes.

2 Q I'd like to pass you a copy of
3 your deposition and ask you about your
4 testimony in that deposition.

5 MR. SCHMIDT: May I approach, Your
6 Honor?

7 JUDGE SIPPEL: Yes. I don't know
8 I'm going to have to pass those around,
9 though. Just ask him the question from the
10 deposition, read it, and see if that's all
11 that you need to do.

12 MR. SCHMIDT: I've asked that
13 several times. If I can just read the
14 testimony, that's all I want to do, Your
15 Honor.

16 JUDGE SIPPEL: Let's proceed that
17 way, and see if that works.

18 MR. TOSCANO: And what page will
19 you be reading from?

20 MR. SCHMIDT: Page 64.

21 JUDGE SIPPEL: The witness has to
22 have it in front of him, of course.

1 MR. SCHMIDT: Okay. May I
2 approach the witness, Your Honor?

3 THE WITNESS: Thank you.

4 MR. SCHMIDT: You're welcome.

5 BY MR. SCHMIDT:

6 Q Look, if you would, at page 64 of
7 your deposition, line 21, and tell me when
8 you're there, and I'll read it.

9 MR. SCHMIDT: Your Honor, would
10 Your Honor like a copy?

11 JUDGE SIPPEL: No, I don't think I
12 need a copy. I will let you know if I do.

13 MR. SCHMIDT: Okay. Thank you,
14 Your Honor.

15 BY MR. SCHMIDT:

16 Q It states, "Question: Was there
17 launch support paid by the Golf Channel to
18 Comcast? Answer: It was launched in I think
19 1995, so I don't know if that would be at all
20 relevant for my analysis today given that it
21 was 16 years ago. Question: So, you don't
22 know one way or the other? Answer: Sitting

1 here today, it's not something that I recall
2 one way or the other. Question: Was there
3 launch support paid by Versus to Comcast? Do
4 you know? Answer: Again, that was launched
5 even -- I mean, a long time ago, as well, so
6 it wasn't relevant to my analysis." Did I
7 read that correctly, sir?

8 A Yes, you did.

9 Q Were you being truthful in this
10 deposition?

11 A Yes.

12 Q You didn't know the MFNs that
13 Comcast required from the channels that it
14 owned, did you?

15 A I didn't remember the letter of
16 the MFNs, no.

17 Q The terms of the contracts were an
18 insignificant factor to you. Correct?

19 A I believe I said it was a
20 significant, insignificant, or tertiary
21 factor.

22 Q Do you know the number of renewals

1 by Comcast of the Versus and Golf contracts
2 since they were first launched?

3 A I believe it would be two, but I
4 may be misguided on that.

5 Q Did you review the history
6 surrounding those renewals, and the analyses
7 that Comcast conducted at the time those
8 agreements were renewed?

9 A I had been exposed to various --
10 the statements from the fact witnesses who
11 know far more about this, because I wasn't
12 sitting in the room.

13 Q Did you go back and review the
14 documents from that time period, and do an
15 analysis of the factors Comcast considered
16 when it decided to renew Golf Channel and
17 Versus at various points in time?

18 A I was not sitting in the room, so
19 the answer is I, obviously, was looking at the
20 carriage of the entities that were not
21 affiliated with Golf and Versus, and that is
22 the most direct evidence that I have with

1 regard to the issue of their carriage.

2 Q Let's go back to my question,
3 please. My question is, I thought, very
4 simple. Did you review documents from the
5 time period when Comcast renegotiated, you
6 said you understand that Comcast has
7 renegotiated with Versus and Golf over time at
8 various points in time. Correct?

9 A Yes.

10 Q When was the most recent one?

11 A I believe for Versus it was [REDACTED],
12 and for Golf it was [REDACTED].

13 Q Okay. And then there were
14 renewals before that. Correct?

15 A For Golf, I believe it was -- the
16 previous renewal was [REDACTED].

17 Q Okay.

18 A Sitting here today, I'm not sure
19 of the precise date of the previous renewal
20 for Versus.

21 Q Did you go back and review the
22 documents generated in connection with those

1 renewals to conduct an analysis of the factors
2 Comcast considered at the time of those
3 renewals?

4 A The actual primary source
5 documents I do not believe that I analyzed in
6 considering their factual decision whether --
7 of how to carry in [REDACTED] or more recently.

8 Q Okay. Did you see any analysis by
9 Comcast of whether Golf and Versus should
10 continue to be carried at a higher
11 penetration, or whether that penetration
12 should be changed in connection with any of
13 these renewals?

14 A No, because obviously other MVPDs
15 are carrying at highly penetrated tiers, as
16 well.

17 Q Did you see any analysis by
18 Comcast of that?

19 A I said no.

20 Q Did you go back and review the
21 documents from the initial carriage decisions
22 by Comcast of Golf and Versus to determine

1 what it was that made them decide to carry,
2 the factors they considered in deciding to
3 carry Golf and Versus as broadly as they did?

4 A In 1995, or 2001?

5 Q Yes, in 1995.

6 A No, I did not.

7 Q Do you know what those factors
8 were?

9 A Sitting here today, I do not know
10 all the factors, except for the history of the
11 industry, that at that time there was excess
12 capacity that cable companies had, and they
13 were looking for channels to launch. So, as
14 a general matter, not specific to these two
15 channels, that was a trend in the industry,
16 that there were a large number of channels
17 launched in that time period, and cable
18 companies were launching them. So, as a
19 specific matter to these two for 1995, no, I
20 was not there, and I have not analyzed that.

21 Q And that's my question. You have
22 nothing specific to what Comcast thought about

1 with respect to these two channels when it
2 launched them in 1995. Correct?

3 A I think the fact witnesses would
4 be better on that.

5 Q You have not done that analysis.

6 A No, I have not.

7 Q Can you point me to -- are you
8 aware that Golf Channel was initially launched
9 in a more highly penetrated tier by Comcast?

10 A I believe it was launched as an a
11 la carte option, if I recall.

12 Q Right.

13 A Which it wasn't even a tier, it
14 was just a single channel on its own.

15 Q Requiring additional payment.
16 Correct?

17 A That is true.

18 Q Had you analyzed why Comcast
19 decided to stop selling Golf Channel on an a
20 la carte basis, and decided to give it broad
21 penetration?

22 A I am -- I did not conduct an

1 analysis of the decision in the mid-1990s to
2 change the -- from a la carte to expanded
3 basic coverage.

4 Q Can you point me to anything other
5 than equity, any fact that you have seen
6 specific to Golf, or specific to Versus that
7 motivated Comcast's decision to provide them
8 with the level of carriage that it did in
9 1995?

10 A I didn't do an analysis one way or
11 the other. I know that the -- as a factual
12 matter, many of the other major MVPDs carried
13 it on a highly penetrated tier. They don't
14 have equity, and that's consistent with the
15 decision that Comcast made. So, that I know,
16 but I have not conducted an analysis of
17 Comcast's decision in the mid-1990s to re-tier
18 from an a la carte to an expanded basic for
19 Golf.

20 Q Well, let me pick up on something
21 you just said. Have you conducted a historical
22 analysis of how other MVPDs -- strike that.

1 Your analysis looked at how MVPDs
2 today carry Golf and Versus. Correct?

3 A Today, and over the past few
4 years.

5 Q Sure. 2009, and 2010. Correct?

6 A Yes.

7 Q Have you gone back in time before
8 2009 to look at how those MVPDs carried Golf,
9 and carried Versus?

10 A I have looked at that data,

11 Q Okay. So, how did they carry it
12 in 1995, or 1996, or 1997? Did you do that
13 analysis?

14 A Sitting here today, I can't recall
15 how other MVPDs carried it back then.

16 Q Do you know whether there were
17 other MVPDs that did not have equity interests
18 in Golf and Versus that provided them with the
19 same level of carriage that Comcast did?

20 A Sitting here today, I do not know
21 when the -- precisely, the date for each MVPD
22 when they offered broad coverage, broad

1 penetration for the Golf Channel.

2 Q So, let me go back to my question,
3 which is, can you point me to any fact other
4 than equity that you've seen in Comcast
5 documents, Comcast testimony, or talking to
6 Comcast witnesses that motivated Comcast to
7 grant broad carriage to Golf or Versus in
8 1995?

9 A It's not an analysis that I've
10 conducted.

11 Q Thank you. Let's go back to the
12 analysis you did conduct. You said that you
13 looked at the costs and the benefits of
14 carrying Tennis Channel. Correct?

15 A I looked at the costs, which you
16 can easily quantify, and I also considered the
17 benefits.

18 Q Okay. You didn't consider revenue
19 that Comcast might realize from additional ad
20 avails that it would enjoy if it granted
21 broader carriage to Tennis Channel. Correct?

22 A I did not quantify that, no.

1 Q Okay. And just so the Judge
2 understands, ad avails are revenue sources for
3 that it gets, they're advertising slots that
4 Comcast would enjoy that would grow in number
5 as it granted greater coverage to Tennis
6 Channel. Correct?

7 A No. It doesn't grow in number.
8 They actually have the same number of slots.

9 Q They get more money from it,
10 though. Correct?

11 A That's a more complicated equation
12 of do they get more money. That depends on
13 the demographics, the degree of competition,
14 and a variety of other factors.

15 Q Generally, the cost of the slots
16 increases and, therefore, Comcast can realize
17 more money. Correct?

18 A I will say it's true as a general
19 matter, but it's not always true.

20 Q And you haven't analyzed whether
21 that's true or not for Tennis Channel, or the
22 magnitude of that growth.

1 A I did not analyze quantitatively
2 the amount of additional ad revenue that
3 Comcast may get as part of a broader
4 distribution of Tennis Channel.

5 Q You didn't analyze quantitatively
6 how much increased subscriber revenue Comcast
7 was likely to achieve from broader
8 distribution, did you?

9 A There was no evidence -- there's
10 no evidence from anyone, from Dr. Singer, or
11 from anyone that suggests that there would be
12 any significant increase in subscriber
13 revenue. And, in fact, the model, as I
14 discussed earlier, that he put forward shows
15 that there is no relationship between the
16 carriage of the Tennis Channel and Comcast
17 market share. So, I did not conduct that
18 analysis, but no one else has, either.

19 Q Okay. So, then let me go back to
20 my question. And, again, I'm trying to ask
21 yes or no questions where I can. Did you
22 quantify how much in increased subscriber